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No. 86-1997

In The

Supreme Court of the United States

October Term, 1986

C.M. ROUSSEAU, JR., *et al.*,

Petitioners,

vs.

TELEDYNE MOVIBLE OFFSHORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals erred in affirming the district court's ruling that, based on all of the facts and circumstances, the off-duty time of Respondent's derrick barge workers spent on board the derrick barge during their seven-day hitch, whether the barge was docked or offshore, was not compensable under the Fair Labor Standards Act.

LIST OF AFFILIATED CORPORATIONS

Teledyne, Inc. is the parent corporation of Respondent, Teledyne Movible Offshore, Inc.

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COUNTERSTATEMENT OF THE FACTS

Petitioners' Statement of the Facts is misleading, selective, and incomplete. The Court is referred to the opinion of the district court for a complete and accurate statement of the relevant facts in this matter, most of which were stipulated to by the parties at trial. Petitioners' Appendix (hereinafter "Pet. App.") 21-33.

The more significant misstatements and omissions in Petitioners' Statement are as follows: First, Petitioners fail to note that their trial testimony establishes that at all times during their employment, in good times and bad, and before and after their daily work schedule was reduced from twelve hours to eight hours, they were fully aware that they would be paid only for that time they spent actively engaged in physical labor and not for time spent "off-duty" on the derrick barge. This arrangement and understanding never changed.

Second, although the testimony indicated that the no-leave rule did "come into focus" more after the derrick barges began spending more time dockside, because now employees were adjacent to the land more often, the overwhelming testimony of the employees showed that they had always been aware of the no-leave rule. Thus, Petitioners' statement that the no-leave rule had not been publicized prior to the 1982 reduction in hours is a misstatement of the record.

Third, the statement that the change in the daily schedule from twelve to eight hours came "shortly" after dockside time increased is incorrect. The barges began "docking" in 1980, approximately two years prior to the reduction in hours. Finally, Petitioners do not mention that the reduction in the scheduled hours was chosen by Respondent as a cost-saving measure in lieu of a layoff, which was seriously considered at the time, and was an option chosen in several other divisions of the Company.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I. SUMMARY OF THE ARGUMENT

Despite Petitioner's hyperbolic attempt to attach significance to the decisions below as the beginning of the end to private enforcement of the Fair Labor Standards Act of 1938, as amended, the fact of the matter is that both decisions are nothing more than well-reasoned and practical applications of well-established principles of interpretation of this Court to the particular facts involved in this matter. The decisions below are not in conflict with any previous decision of this Court, nor will they have the adverse future impact unbelievably suggested by Petitioners. In essence, the Petition amounts to little more than a request that this Court engage in its own factual scrutiny of the trial evidence regarding the arrangement between Petitioners and Respondent concerning the compensability of certain hours. No amount of rhetoric can convert the highly fact specific issue involved in this case into one warranting review on certiorari.

II. THE DECISIONS BELOW DO NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

Amazingly, Petitioners contend that the Court of Appeals' decision directly conflicts with the two leading decisions of this Court concerning the compensability of "waiting time," *Armour & Company v. Wantock*, 323 U.S. 126 (1944) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Rather than conflicting with the principles established by this Court in *Armour* and *Skidmore*, the analysis of the district court affirmed by the Court of Appeals epitomizes proper application of the analytical stan-

dards enunciated in those two decisions and rejects Petitioners' request to apply generalized examples contained in administrative guidelines to a unique fact setting.

In *Skidmore*, this Court made it clear that it would not and could not lay down a legal formula to resolve cases so varied in facts as are the many situations in which employment involves waiting time. 323 U.S. at 132-133. Despite Petitioners' insistence that those cases somehow control this one, because of the similarity of some of the facts[1], the only "rule" enunciated by this Court in *Armour* and *Skidmore* is that there are no general controlling rules in an "hours worked" determination and that each case must turn on its own facts. As stated by this Court in *Skidmore*:

> Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. . . . This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. 323 U.S. at 136-137.

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[1]The Petitioners' argument that the *Skidmore* decision controls and thus dictates a different result herein also ignores the fact that *Skidmore* did *not* find that the waiting time in question was compensable, but reversed and remanded, based on the erroneous view of the law held by the lower court. In fact, the Court specifically noted factual differences between the case before it and *Armour* that could lead to a finding of noncompensability. 323 U.S. at 140.

As well-stated by the Court of Appeals below, findings of compensability are "highly fact specific." Pet. App. 5. It, like the district court, properly recognized that when it comes to "hours worked" determinations, including those involving "waiting time," a court cannot look to the facts of previous decisions for controlling guidance, since each determination must turn upon careful scrutiny of the facts before it. It reviewed the fact findings of the district court and properly found that the findings were supported by the record.

Despite Petitioners' refusal to admit it, the circumstances of this case are unique, and were treated as such by the district court in arriving at its conclusion that the hours in question were noncompensable. It is obvious from reading the district court decision on the hours worked question, Pet. App. 20-52, that it did not base its finding of noncompensability on one or two factors, but that it analyzed the entire relationship between the parties, including the total history of Petitioners' employment with Respondent and their long-existing working arrangement, the particular worksite involved, the fact that the Petitioners worked a "seven-and-seven" shift, and the underlying economic situation. Obviously, Petitioners would have preferred it if the district court would have not conducted a careful scrutiny of the unique circumstances involved in the case before it, and would have simply said "Since the employees could not leave the premises during their off-duty time, since they preferred to be elsewhere, and since these facts in many work settings might mean compensability, I find the hours in question compensable." However, this approach would have been directly contrary to the dictates of this Court

in *Skidmore*. As recognized by the Court of Appeals, the district court correctly applied the method of analysis required by this Court's previous holdings, and by no stretch of the imagination does its decision conflict with those holdings.

Petitioners also contend that the decision below is somehow inconsistent with this Court's decision in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). The contention is that since *Barrentine* held that employees cannot waive their rights under the Fair Labor Standards Act by entering into agreements to do so, Petitioners could not waive their rights herein by entering into any implied agreement with Respondent as to which hours would be compensated. This argument has been repeatedly made by Petitioners in the lower courts, and has been properly rejected. It is clear that the implied agreement found by the courts below helped *define* the rights of the parties. The question is not whether rights can be waived by the parties but rather what are the rights of the parties.

The waiver argument has been made by plaintiffs in hours worked cases before, and has consistently been rejected as inapplicable when a court is determining whether or not an agreement exists for purposes of defining compensable time. A good example is *Bowers v. Remington Rand, Inc.*, 159 F.2d 114 (7th Cir. 1946), *cert. den.*, 330 U.S. 843 (1947), in which the court was also faced with an argument by the plaintiffs that they were entitled to 24-hour compensation because overtime rights could not be waived. The court disagreed with this theory and/or characterization of the case, stating:

> To be sure, agreements which violate the provisions or purposes of the Act will not be given effect. That rule is settled; that rule, however, does not apply to an agreement to settle the question of whether certain activity or non-activity constitutes work or employment. 159 F.2d at 116.

The Fifth Circuit has also recently rejected the same waiver argument in *Allen v. Atlantic Richfield Company*, 724 F.2d 1131, 1135-1136 (5th Cir. 1984).

Finally, the Petitioners' claim that the decisions below conflict with this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), is also without merit, since *Anderson* dealt with the issue of whether or not certain time spent in certain "preliminary" or "postliminary" activities on the employer's premises was compensable and was not concerned with extended periods of inactive, off-duty "waiting" time spent by employees who reside on the employer's premises. That an issue of a different dimension was involved is well-evidenced by this Court's failure to discuss or even cite its previous decisions in *Armour* and *Skidmore*.

Thus, it is patently obvious that the decisions below meticulously follow, rather than conflict with, the mode of analysis adopted in prior waiting time decisions of this Court.

III. THE DECISIONS BELOW ARE NOT CONTRARY TO THE WAGE AND HOUR ADMINISTRATOR'S GUIDELINES

Throughout the litigation in the lower courts, and again in their Petition, Petitioners argue that the Interpretative Bulletin of the Administrator of the Wage and Hour Division somehow "controlled" this case and mandated a finding that the hours in question were compen-

sable. This argument was properly ignored by the lower courts, in light of the dictates of this Court in *Skidmore,* and the recognition by the Wage and Hour Administrator himself, that there can be no formula for general application in every case.

It is also significant that this Court has made it clear that although the guidelines issued by the Administrator of the Wage and Hour Division do constitute "a body of experienced and informed judgment to which courts and litigants *may* properly resort for guidance," they are not controlling on courts, and courts have the power to issue rulings that may be at odds with the guidelines "where justified by very good reasons." *Skidmore,* 323 U.S. at 140. Thus, even if the rulings below did conflict with the guidelines, it was within the lower courts' judicial prerogative to reject their application in this case.

Of course, Petitioners' argument assumes that the lower court decisions conflict with the Administrator's guidelines, which is a totally insupportable position. Even the Administrator has recognized that its practical guidelines set out in the Interpretative Bulletin at 29 C.F.R., Part 785, cannot include every possible situation, and that they only seek to apply principles to situations that "frequently arise." At 29 C.F.R. 785.1, he cautions that "no inference should be drawn from the fact that a subject or an illustration is omitted." Needless to say, a case involving seven-and-seven hitch workers residing on movable derrick barges in the declining offshore oil industry of Louisiana is not a situation that frequently arises, and is not one that has been treated in the guidelines.

The Administrator restates the *Skidmore* and *Armour* principles in 29 C.F.R. § 785.14, declaring whether or not "waiting time" is compensable "depends upon particular

circumstances" in each case. After this general introduction, the Administrator simply gives examples of factors that may be relevant in attempting to determine whether an employee is "on duty," "off duty," etc., and whether certain time is compensable. It is these examples that Petitioners argue are controlling on the courts in this matter. This argument is contrary to the case law and to the guidelines themselves.

IV. THE DECISIONS BELOW DO NOT HOLD THAT A FAILURE TO QUIT LEGITIMATES A VIOLATION OF THE FAIR LABOR STANDARDS ACT, NOR DO THEY HOLD THAT THE PETITIONERS' FAILURE TO QUIT IN AND OF ITSELF CREATED AN IMPLIED AGREEMENT

In order to attribute cataclysmic significance to the lower courts' decisions so as to create an issue worthy of review, Petitioners characterize the holdings below as saying that if an employee fails to quit his employment when faced with a practice that violates the Fair Labor Standards Act, he will be bound by the practice. A review of the decisions indicates the patent absurdity of this characterization, and no additional response is necessary.

Petitioners also seem to suggest that the district court based its finding of an implied agreement solely on the basis that the employees failed to resign their employment after the schedule change from twelve to eight hours in October of 1982. Again, a review of the decisions demonstrates the misplaced nature of this characterization. The district court, in finding an implied agreement between the parties, considered the entire relationship between the parties, and focused on the testimony of the Petitioners themselves that they always fully understood what hours they

would be paid for at all times during their employment with Respondent and that this understanding regarding compensability never changed, regardless of the circumstances.

The evidence did show that the Petitioners did complain more about having to stay on the barge after their daily work schedules were reduced from twelve hours to eight hours. They thus argued to the lower courts that these complaints negated any continued implied agreement as to compensability that may have existed prior to the reduction. In response, the district court stated that the "working arrangement" regarding what hours would be paid never changed, and that the mere fact that they complained more after the reduction did not negate the continued existence of an implied agreement regarding the compensability of the off-duty hours. Pet. App. 17, 22-25. It is clear that the district court did not hold that the implied agreement regarding compensability was created by the employees' failure to quit after the schedule change; it simply held that the already-established implied agreement was not affected by the post-reduction increase in complaints. In so concluding, the court noted the well-established principle of employment law that continued employment with full knowledge and awareness of a term of employment may be considered to be an implied agreement to said term, despite dislike of the term. *E.g., Williams v. Jacksonville Terminal Company,* 315 U.S. 386, 398 (1942); *Shepler v. Crucible Fuel Company,* 140 F.2d 371, 374 (3rd Cir. 1944); *Peffer v. Federal Cartridge Corporation,* 63 F.Supp. 291, 304 (D.C. Minn. 1945). The actions of Petitioners in this case were consistent with this accepted principle.

The Court of Appeals simply held that the record supported the district court's factual finding of an agreement between the parties, and it agreed with the district court that the employees' expressed dislike of the no-leave rule did not negate the unchanged working agreement regarding compensability. Pet. App. 7.

Also without merit is the attempt of Petitioners to strike an analogy between the criminal case of *Garrity v. State of New Jersey,* 385 U.S. 493 (1967) and this case. That case involved the constitutional protection against self-incrimination, and the specific issue was whether or not the State can use the threat of discharge to secure incriminatory evidence against an employee. In holding that it could not, this Court did distinguish, however, the dictum of Justice Holmes in an earlier state court decision, in which he declared a principle more relevant to the case *sub judice:* that generally, with respect to the implied terms of his contract, an employee "cannot complain, as he takes the employment on the terms which are offered to him." 385 U.S. at 499.

V. THE HOLDINGS OF THE DECISIONS BELOW ARE LIMITED TO THE UNIQUE FACTS OF THIS CASE AND WILL HAVE NO SIGNIFICANT FUTURE IMPACT

It is the mischaracterization of the holdings below, discussed in the preceding section, that lead into Petitioners' contention that the rulings below will impact millions of American employees in various industries by allowing employers to imprison them on their premises without pay, and if the employees do not quit their job, the system of compensation deemed to be validated automatically. The

absurdity of this proposition is demonstrated by a realistic reading of the decisions and by the fact that it is well-established that no case decided on an "hours worked" issue will control any future case, this possibility being proscribed by this Court. As stated by this Court in *Skidmore*, "[e]ach case must stand on its own facts." 323 U.S. at 140. Additionally, when one examines the unique overall factual circumstances involved in this case, the likelihood of its having any future precedential value, even by analogy, is miniscule.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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